Filed 12/18/15 In re D.S. CA1/2

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

In re D.S., a Person Coming Under the Juvenile Court Law.	
THE PEOPLE, Plaintiff and Respondent, v. D.S., Defendant and Appellant.	A144024 (Alameda County Super. Ct. No. SJ13213692)

BY THE COURT:

It is ordered that the opinion filed herein on November 24, 2015, be modified as follows:

1. In the second paragraph of the Factual and Procedural Background on page 2, the phrase "several males in dark clothing, one with a red T-shirt" is changed to "three males, one with a red T-shirt, one in dark jeans, and one in all-black clothing."

2. At the end of the first paragraph in subsection (a) on page 5, the following is added: "Under the *Terry* doctrine, "a law enforcement officer, for his own protection and safety, may conduct a patdown to find weapons that he reasonably believes or suspects are then in the possession of the person he has accosted." (*Ybarra v. Illinois* (1979) 444 U.S. 85, 93 (*Ybarra*).)"

3. In the first sentence of the first full paragraph on page 6, the phrase "Defendant urges us to analogize this case to" is changed to "We are not persuaded by defendant's reliance on cases such as."

The petition for rehearing is denied. This modification does not change the judgment.

Dated:_____ _____

Richman, Acting P.J.

Filed 11/24/15 In re D.S. CA1/2 (unmodified version)

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Defendant D.S., a 17-year-old male, was out and about with four other male teenagers near the South Hayward BART station on a school day, during school hours. The youths were detained by the police, and questioned about their ages and where they went to school. Only one of the five youths was forthcoming; he was put in a patrol car to be taken to school. A second youth, who gave contradictory information as to whether he was supposed to be in school, admitted to having a lighter; a cursory search revealed that he also had a loaded and cocked handgun. A third youth then admitted to having a gun, which was found to be a loaded revolver. After the two loaded guns were found, an officer pat searched the defendant for weapons and found none, but did find in defendant's pocket a plastic bag containing smaller plastic bags of marijuana.

The district attorney filed a wardship petition charging defendant with possession of marijuana for sale. Following a contested jurisdiction hearing pursuant to Welfare and

Institutions Code section 602, the juvenile court found the allegation true. At the disposition hearing, the juvenile court committed defendant to the care, custody and control of the probation department and imposed terms of probation.

On appeal, defendant raises two issues. First, he contends that the juvenile court erred in denying his motion to suppress the marijuana as the result of an unconstitutional search. Second, he contends that the probation conditions prohibiting him from wearing or displaying gang-related apparel, and from acquiring gang-related piercings, are unconstitutionally vague.

We find that the juvenile court did not err in denying the motion to suppress. We will modify the probation conditions that concern apparel and piercings, and affirm the disposition as modified.

FACTUAL AND PROCEDURAL BACKGROUND

Defendant, then age 17, was one of five teenaged males detained by the police on the morning of October 16, 2014.

At about 9:00 a.m. on October 16, Hayward Police Officer Alan Reynaga was on routine patrol near the South Hayward BART station, in an area known for robberies, burglaries and drug activity. He was ordered to investigate a call that had reported several males in dark clothing, one with a red T-shirt, jumping over a fence into a nearby apartment complex. The males were reported as hiding between cars and possibly running from the police. It took Reynaga less than a minute to drive to the area, where he saw a group of five males less than a block from the apartment complex. They wore dark clothing and one wore a red T-shirt. They appeared to be between the ages of 13 and 17, so he ordered them to sit on the curb so that he could investigate whether they were truant. Defendant was one of the five youths.

Three other Hayward Police Officers quickly arrived at the scene, including Officers Dean Valencia and Armando Diaz. The officers began questioning the youths about where they lived and where they went to school. L.T., the first youth questioned by Officer Reynaga, was vague in his responses. Officer Diaz questioned Daniel B., who was wearing a red T-shirt. Daniel B. admitted that he was supposed to be at school. Diaz

pat searched Daniel B. before putting him in a police car to take him to school; Diaz found a lighter, but no weapons. Officer Valencia questioned Frank A., who gave contradictory answers about where he lived and whether he was supposed to be in school. Intending to take Frank A. to the police department for further investigation, Valencia asked Frank A. whether "he had any contraband or weapon." Frank A. said that he had a lighter in his pocket, and Valencia retrieved it. Valencia then pat searched Frank A. and felt a "sharp—or a long object" in Frank A.'s jacket pocket, which turned out to be half a scissors with the end broken off. Valencia recognized this as a tool commonly used to start and steal cars. He continued the search and then felt what he believed to be the handle of a gun. He yelled "gun" to the other officers and held Frank A. while Officer Diaz retrieved the weapon, which turned out to be a loaded and cocked handgun.

Officer Valencia asked if anyone else was armed. L.T. said he had a gun in his backpack, and gave Officer Reynaga permission to look inside. Reynaga opened the backpack and recovered a loaded revolver.

Officer Diaz then informed defendant that he would be searched. Diaz had been trained in pat searching and identifying contraband, and had experience in recovering marijuana that had been packed in plastic bags. While conducting a pat search of the exterior of defendant's front right pocket, Diaz "felt a bag that I recognized as—felt like a bag of marijuana. [¶] I encountered that several times, a bag with smaller bags inside of it, or lumps inside of it." Through the pocket, he touched something that felt "like a bag, a plastic bag. It was pockets. It was slick. And as I applied pressure to it, I felt multiple objects inside, possible additional baggies inside of it. I recognized it as a—what felt like marijuana." Diaz then extracted from defendant's pocket a press-lock plastic bag containing smaller press-lock plastic bags of a green leafy substance that was later determined to be over 7 grams of marijuana. Defendant was arrested for possession of marijuana for sale.

On October 17, 2014, the Alameda County District Attorney filed a juvenile wardship petition against defendant pursuant to Welfare and Institutions Code section 602, subdivision (a). The petition charged defendant with possession of

marijuana for sale in violation of Health and Safety Code section 11359 and distribution of marijuana in violation of Health and Safety Code section 11360, subdivision (a).

At a combined suppression and jurisdiction hearing, defendant moved to suppress the marijuana, arguing that there was no reasonable suspicion to justify searching him and that the search itself was unlawful by virtue of the officer's "manipulating" the soft lump in defendant's pocket and removal of the bag of marijuana.

The juvenile court denied the motion to suppress, sustained the count of possession of marijuana for sale, and made no finding on the count of distribution of marijuana, which the district attorney had withdrawn. At the subsequent disposition hearing, the juvenile court committed defendant to the care, custody and control of the probation department and approved placement at Camp Wilmont Sweeney. The juvenile court imposed several probation conditions, including the requirements that defendant "not . . . wear gang clothing, colors, or emblems, or get any tattoos or piercings." Defendant's counsel did not object to the terms of probation at the time they were imposed in the juvenile court. This appeal timely followed.

Defendant contends that it was error for the juvenile court to deny his motion to suppress and that the probation conditions described above are unconstitutionally vague.

DISCUSSION

A. *Defendant's Motion to Suppress*

1. *Standard of Review*

"The standard of review of a trial court's ruling on a motion to suppress is well established and is equally applicable to juvenile court proceedings. ' "On appeal from the denial of a suppression motion, the court reviews the evidence in a light favorable to the trial court's ruling." ' " (*In re Lennies H.* (2005) 126 Cal.App.4th 1232, 1236, quoting *In re William V.* (2003) 111 Cal.App.4th 1464, 1468.) We defer to the juvenile court's factual findings, express or implied, when they are supported by substantial evidence. (*People v. Superior Court* (*Chapman*) (2012) 204 Cal.App.4th 1004, 1011.) We then exercise our independent judgment in applying the law to the factual findings to determine whether the factual record supports the juvenile court's conclusions that the

search or seizure was reasonable under the Fourth Amendment. (*People v. Rogers* (2009) 46 Cal.4th 1136, 1157.)

2. *Analysis*

Defendant contends that the juvenile court erred in denying his motion to suppress. Defendant does not contest his detention by the officers, noting that "Hayward's truancy ordinance authorizes a brief detention of juveniles of apparent school age observed during school hours to question them about their possible truancy." Instead, he makes two arguments. First, he contends that under the circumstances, the officers lacked reasonable suspicion that defendant was personally armed. Second, he contends that the officer lacked probable cause to reach into defendant's pocket and retrieve the bag of marijuana. We address each contention in turn.

a. *Reasonable Suspicion Justified a Pat Search*

An officer may pat search a detainee for weapons if, in view of the totality of circumstances, the officer has reason to believe that his safety or that of others is in danger. (*Terry v. Ohio* (1968) 392 U.S. 1, 26 (*Terry*).) The critical question is whether, under the specific facts and circumstances, "the officer can reasonably believe in the possibility that a weapon may be used against him." (*People v. Superior Court* (*Simon*) (1972) 7 Cal.3d 186, 204, superseded by statute on a different point as stated in *People v. Castaneda* (1995) 35 Cal.App.4th 1222, 1229.)

Defendant contends that Officer Diaz "did not reasonably believe that defendant was armed and presently dangerous," and that therefore his pat search of defendant was unconstitutional. Defendant argues that nothing in his appearance or actions suggested that he was carrying a weapon. The Attorney General contends that the pat search was justified by concerns for the safety of the officers and others, in view of the fact that after Daniel B., who admitted to being truant, had been placed in a patrol car, defendant was part of a group of four youths, two of whom had been evasive about their presence in the area and had just been found in possession of loaded handguns.

We agree with the Attorney General that in these circumstances, Officer Diaz had reasonable suspicion to pat search defendant for weapons. He and the other police

officers on the scene were investigating a call that had reported suspicious behavior at a particular location by a group of males in dark clothing, including one with a red T-shirt. Very shortly thereafter, close by the reported location, officers stopped a group of males that included the defendant. The males in the group were wearing dark clothing; one wore a red T-Shirt. After finding two concealed and loaded handguns among the group, it was reasonable for Diaz to believe that there might be further concealed weapons to be found among the group. (See *People v. Thurman* (1989) 209 Cal.App.3d 817, 823 [search for weapons is justified where officers cannot discount the possibility that one or more of the people at the scene are personally armed, even though defendant's conduct and appearance is not threatening].) Therefore, a pat search of defendant was justified here.

Defendant urges us to analogize this case to *Ybarra v. Illinois* (1979) 444 U.S. 85, 93 (*Ybarra*), or *United States v. Thomas* (9th Cir. 1988) 863 F.2d 622, 629 (*Thomas*), or *United States v. Flatter* (9th Cir. 2006) 456 F.3d 1154, 1157-1158 (*Flatter*), cases in which "nothing about [defendants'] appearance, conduct or demeanor objectively indicated that [they were] armed." Defendants' cases are inapposite. In *Ybarra*, the officers had no reason to believe Ybarra might be armed: police searched him because he just happened to be "present, along with several other customers, in a public tavern at a time when the police had reason to believe that the bartender would have heroin for sale." (*Ybarra, supra,* 444 U.S. at p. 91.) In *Thomas*, police searched a man who simply got out of his car without being asked to do so. (*Thomas, supra,* 863 F.2d at p. 628.) An officer investigating a felony had pulled a patrol car in front of Thomas' car, and when Thomas exited his car it was clear that he did not match the description of either of the suspects being sought. (*Ibid.*) No weapons had been mentioned or found at the time he was searched, and by that time he had already satisfactorily answered an officer's questions about who he was and why he was there. (*Id.* at pp. 628-629). In *Flatter*, an officer searched a man who was being questioned about mail theft; Flatter was in a room with officers and a union representative who, upon being questioned, had stated that he had no weapons. (*Flatter, supra,* 456 F.3d at p. 1156.) The officers had no reason to believe

Flatter might be armed, and no weapons had been found at the time he was searched. (See *id.* at p. 1157.) The facts and circumstances of these cases are in stark contrast to the facts and circumstances here, where two of defendant's four companions had been found to be carrying concealed and loaded handguns when Officer Diaz proceeded to pat search the defendant.

b. *Probable Cause Justified Removing the Bag of Marijuana*

Police may retrieve contraband that is discovered in the course of a legitimate *Terry* search if the contraband is plainly detected through the sense of touch, which requires that the incriminating character of the object at issue be immediately apparent to the officer. (*Minnesota v. Dickerson* (1993) 508 U.S. 366, 379 (*Dickerson*).) If an object is determined not to be a weapon and its incriminating character as contraband is not immediately apparent, the object may not be seized: if the officer already knows that a pocket contains no weapon, he may not manipulate the contents of the pocket to determine whether an object is contraband. (*Id.* at p. 378.) Nor may he squeeze an object from the outside to determine whether it is contraband. (*People v. Dickey* (1994) 21 Cal.App.4th 952, 957.) Here, the juvenile court found that Officer Diaz testified that "he immediately recognized" the object in defendant's pocket as marijuana.

Defendant contends that the juvenile court's factual finding is not supported by substantial evidence, pointing to some of Officer Diaz's testimony on cross examination, including the following:

"Q: And once you knew it wasn't a weapon, is that what you did? Did you squeeze it to try and figure out what was the—

"A: Yes, sir. I felt—I recognized it as a potential form of contraband. I've encountered that before. . . .

"Q: Could have been—so you manipulated it some more to get a better idea as to whether or not it was, correct?

"A: Yes, sir.

"Q: And after you manipulated it for a while, you suspected that's what it was, correct?

"A: Yes, sir."

Defendant contends that from this testimony "it is clear that Officer Diaz did not have *probable cause* to believe that the soft lump . . . was a baggie containing marijuana or other contraband at first touch. He may have suspected that the lump was potential contraband, but that did not justify retrieving the object from appellant's pocket."

The Attorney General points to other portions of Officer Diaz's testimony as supporting the juvenile court's finding:

"Q: And describe for us what you did when you searched [defendant].

"A: I informed him I was going to search him because we recovered two guns already from the group. While I was searching the exterior, did a cursory search, I believe it was his right front pocket. I felt a bag that I recognized as—felt like a bag of marijuana. I encountered that several times, a bag with smaller bags inside of it, or lumps inside of it."

Further, when asked to describe what he felt when he touched the right front pocket, Officer Diaz said, "I felt—I felt like a—like a bag, a plastic bag. It was pockets. It was slick. And as I applied pressure to it, I felt multiple objects inside, possible additional baggies inside of it. I recognized it as a—what felt like marijuana." Officer Diaz had joined the Hayward Police Department as a police officer four months earlier, and was near the end of his period of field training. He had previously worked as a jail officer for more than a year; he was trained and experienced in pat searching and in determining what contraband feels like in a pocket.

Taken as a whole and in a light favorable to the juvenile court's ruling, the testimony here, which includes Officer Diaz's testimony about his prior training and experience as a police and jail officer, constitutes substantial evidence to support the juvenile court's finding that upon touching the lump in defendant's pocket, Officer Diaz immediately recognized the object in question as contraband. Under those circumstances, Officer Diaz was permitted to seize the contraband without a warrant. (*Dickerson*, *supra*, 508 U.S. at pp. 375-376.)

Thus, we affirm the juvenile court's denial of defendant's motion to suppress.

B. *Defendant's Objections to Probation Conditions*

At the disposition hearing, the juvenile court ordered defendant "not to wear gang clothing, colors, or emblems, or get any tattoos or piercings." The Minute Order states those prohibitions as two conditions with somewhat different wording: "Minor is not to wear or display items reasonably known to be associated with or symbolic of gang membership," and "Minor is not to acquire any new tattoos or gang-related piercings." Defendant contends that in both wordings the conditions are unconstitutionally vague and overbroad.[1]

Generally we review probation conditions for abuse of discretion. (*People v. Olguin* (2008) 45 Cal.4th 375, 379.) The legal principles that govern our review of probation conditions alleged to be unconstitutionally vague are set forth in *Victor L., supra,* 182 Cal.App.4th at p. 910:

"The permissible scope of discretion in formulating terms of juvenile probation is even greater than that allowed for adults. '[E]ven where there is an invasion of protected freedoms "the power of the state to control the conduct of children reaches beyond the scope of its authority over adults . . . ." ' (*Ginsberg v. New York* (1968) 390 U.S. 629, 638.) This is because juveniles are deemed to be 'more in need of guidance and supervision than adults, and because a minor's constitutional rights are more circumscribed.' ([*In re*] *Antonio R.* [(2000)] 78 Cal.App.4th [937,] 941.) Thus, ' " 'a condition of probation that would be unconstitutional or otherwise improper for an adult probationer may be permissible for a minor under the supervision of the juvenile court.' " ' ([*Sheena K.* (2007)] 40 Cal.4th 875, 889 . . . ; see also *In re R.V.* (2009) 171

[1] Defendant did not object to any of the probation conditions as being unconstitutionally vague or overbroad at the time the juvenile court imposed them. Nevertheless, his arguments may be made for the first time on appeal "so long as they present pure questions of law based solely on facial constitutional grounds and do not require a review of the sentencing record, and are easily remediable on appeal." (*In re Victor L.* (2010) 182 Cal.App.4th 902, 907 (*Victor L.*).) We therefore address the merits here because they present "pure question[s] of law, easily remediable on appeal by modification of the condition[s]." (*In re Sheena K* (2007) 40 Cal.4th 875, 888 (*Sheena K.*).)

Cal.App.4th 239, 247; *In re Frank V.* (1991) 233 Cal.App.3d 1232, 1242-1243 [rule derives from court's role as *parens patriae*].)

"Of course, the juvenile court's discretion is not boundless. Under the void for vagueness doctrine, based on the due process concept of fair warning, an order ' "must be sufficiently precise for the probationer to know what is required of him, and for the court to determine whether the condition has been violated." ' (*Sheena K., supra,* 40 Cal.4th at p. 890.) The doctrine invalidates a condition of probation ' " 'so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application.' " ' (*Ibid.*) By failing to clearly define the prohibited conduct, a vague condition of probation allows law enforcement and the courts to apply the restriction on an ' " '*ad hoc* and subjective basis, with the attendant dangers of arbitrary and discriminatory application.' " ' (*Ibid.*)" (*Victor L., supra,* 182 Cal.App.4th at p. 910.)

Where a vague probation condition can be modified " 'without reference to the particular sentencing record developed in the trial court' [citation], an issue of law arises subject to de novo review on appeal. [Citation.]" (*People v. Mendez* (2013) 221 Cal.App.4th 1167, 1172.)

Here, the parties agree that the apparel condition as stated in the minute order should be modified to conform to the juvenile court's oral pronouncement, with the result that the condition states that defendant may not wear or display "clothing, colors or emblems" associated with gang membership, rather than stating that defendant may not wear or display "items" associated with gang membership. The parties also agree that the juvenile court may prohibit a minor from acquiring any new tattoos, whether the tattoos have any symbolic association or not, and that the prohibition against piercings is to be understood as limited to piercings that are associated with gang membership.

With those issues resolved, it remains for us to consider Defendant's objection that the conditions do not adequately reflect the due process requirement that he have personal knowledge that particular clothing, colors, emblems are "associated with or symbolic of gang membership" and that particular piercings are "gang-related." (*Sheena K., supra,* 40 Cal.4th at p. 892.)

The Attorney General concedes that personal knowledge is required for the apparel condition, and proposes a modified condition stating that the prohibited items of apparel are those that defendant knows, or that the probation officer informs him, are associated with or symbolic of gang membership. Defendant agrees to the Attorney General's proposed modification, which is similar to modifications that appellate courts have made in cases raising similar issues. (*People v. Leon* (2010) 181 Cal.App.4th 943, 951; *In re Vincent G.* (2008) 162 Cal.App.4th 238, 247-248.) We will so modify the apparel condition.

The Attorney General argues that the piercing condition is adequate without a specification that defendant have personal knowledge of whether a piercing has gang significance, noting that a similarly-worded condition was prescribed by the court in *In re Antonio C.* (2000) 83 Cal.App.4th 1029. There, the court modified a piercing condition to read that the minor "shall not obtain any piercings with gang significance or not in compliance with Penal Code section 652, subd. (a)." (*Id.* at p. 1036.)

Although the language prescribed in *In re Antonio C.* does not specify a knowledge requirement, it is clear that a knowledge requirement applies to gang-related piercings, just as it does to other probation conditions that concern gang affiliation. (See *In re Vincent G.*, *supra*, 162 Cal.App.4th at pp. 247-248.) Accordingly, we will modify the wording of the piercing condition to reflect that requirement. In so doing, we will adopt the formulation to which the parties agreed for specifying the knowledge requirement in the apparel condition.

DISPOSITION

The minute order of the December 16, 2014, disposition hearing before the juvenile court is modified with respect to the challenged probation conditions as follows. The apparel condition shall read, "Minor is not to wear or display clothing, colors or emblems that he knows, or that the probation officer informs him, are associated with or symbolic of gang membership." The body-modification condition shall read, "Minor is not to acquire any new tattoos or any piercings that he knows, or that the probation officer informs him, are associated with or symbolic of gang membership."

In all other respects, the judgment is affirmed.

_____
Miller, J.

We concur:

_____
Richman, Acting P.J.

_____
Stewart, J.

A144024, *People v. D.S.*